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Lew Pa Leong v Chi Shen Lan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–402 OF 2006

B GOPAL SRI RAM, ZAINUN ALI AND HASAN LAH JJCA

9 OCTOBER 2006

Land Law — Ownership — Claim for — Subject property registered in wife's name —

C *Whether wife held property in trust for the husband*

Trusts and Trustees — Land — Defendant registered as sole proprietor — Presumption of advancement — Whether presumption rebuttable

D

The High Court dismissed the plaintiff's/appellant's originating summons for a declaration that the defendant/respondent held a one half share in a certain property in trust for him. The plaintiff and the defendant were husband and wife. The subject

E property was registered in the defendant wife's name. The plaintiff's case was that he paid for the subject property and that the defendant paid nothing for it. It was also his case and this was the basis for the declaration which he sought from the High Court that there was a common intention between him and the defendant wife that she should hold a half share in the subject property in trust for him. The defendant's case was that she paid for the subject property; that the husband lacked the financial

F ability to have provided any part of the purchase price; that accordingly she was both the owner at law and in equity of the subject property.

G **Held**, dismissing the appeal:

(1) The documentary evidence did not support the defendant wife. If that were the only ground on which this appeal stood, the court would perforce to have found for the plaintiff. But there was another point. The parties being husband and wife, the purchase and registration of the subject property by the plaintiff

H husband in the defendant wife's name made the wife the beneficial owner of the subject property by reason of the presumption of advancement operating in her favour. There was, however, a very important qualification. The presumption of advancement may not be rebutted by evidence of an improper purpose (see paras 4–5).

I (2) The plaintiff husband must in order to establish his case against the defendant rely on the true purpose for registering the subject property in his wife's name. That purpose was to show to the world at large, including his potential creditors that the subject property was not his. But between him and his wife, he would tell her that half of it belonged to him. The husband could not have it both ways. He could not say that the house was his own and, at one and the

same time, say that it was his wife's. As against his wife, he wanted to say that it belonged to him. As against his creditors, that it belonged to her. That simply would not do. Either it was conveyed to her for her own use absolutely: or it was conveyed to her as trustee for her husband. The presumption was that it was conveyed to her for her own use: and he did not rebut that presumption by saying that he only did it to defeat his creditors (see paras 7, 10).

[Bahasa Malaysia summary

Mahkamah Tinggi menolak saman pemula plaintif/perayu untuk satu deklarasi bahawa defendan/responden memegang setengah bahagian satu hartanah sebagai amanah untuknya. Plaintif dan defendan adalah suami isteri. Hartanah tersebut didaftarkan atas nama isteri defendan. Kes plaintif ialah beliau telah membayar hartanah tersebut dan defendan tidak membuat sebarang pembayaran. Ia juga merupakan kes beliau bahawa ini adalah satu asas untuk satu deklarasi daripada Mahkamah Tinggi bahawa terdapat niat bersama di antaranya dan defendan isteri bahawa defendan isteri memegang setengah bahagian hartanah tersebut sebagai amanah untuknya. Kes defendan ialah bahawa beliau membayar hartanah tersebut; bahawa suaminya tidak mempunyai kemampuan dari segi kewangan untuk membuat bayaran harga pembelian tersebut; bahawa dengan itu beliau adalah pemilik di bawah undang-undang dan juga di bawah ekuiti hartanah tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Bukti-bukti dokumentar tidak menyokong defendan isteri. Sekiranya itu merupakan hanya satu alasan di mana rayuan ini bergantung, maka mahkamah akan berpihak kepada plaintif. Akan tetapi terdapat satu lagi isu. Pihak-pihak yang merupakan suami isteri, pembelian dan pendaftaran hartanah tersebut oleh plaintif suami atas nama defendan isteri menjadikan isteri pemilik benefisiari hartanah tersebut atas alasan anggapan pendahuluan yang memihaknya. Akan tetapi, terdapat satu kelayakan yang penting. Anggapan pendahuluan tidak mungkin dipatahkan dengan bukti alasan yang tidak betul (lihat perenggan 4–5).

(2) Untuk membuktikan kesnya terhadap defendan, plaintif mesti bergantung kepada tujuan yang sebenarnya dalam mendaftarkan hartanah tersebut di atas nama isterinya. Tujuan tersebut adalah untuk menunjukkan ke mata dunia keseluruhannya, termasuk bakal pemiutang- pemiutangnya bahawa hartanah tersebut bukan kepunyaannya. Tetapi di antaranya dan isterinya, beliau akan memberitahunya bahawa setengah bahagian hartanah tersebut adalah miliknya. Si suami tidak boleh menghendaki segala-galanya. Beliau tidak boleh menyatakan bahawa rumah tersebut miliknya dan, pada masa yang sama, bahawa ia milik isterinya. Terhadap isterinya, beliau ingin menyatakan ia miliknya. Terhadap pemiutang-pemiutangnya, beliau menyatakan ia milik isterinya. Ini tidak boleh berlaku. Sama ada ia dipindahkan kepadanya untuk kegunaannya sepenuhnya; atau ia dipindahkan kepadanya sebagai pemegang amanah untuk suaminya. Anggapan ialah bahawa ia dipindahkan kepada isterinya untuk kegunaannya sendiri: dan beliau tidak menyangkal anggapan

tersebut dengan menyatakan bahawa beliau berbuat demikian hanya untuk mengelak pemiutang-pemiutangnya (lihat perenggan 7, 10).]

Notes

For a case on defendant registered as sole proprietor, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2087.

For cases on claim for ownership, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3393–3396.

Cases referred to

Koh Siak Poo v Sayang Plantation Bhd [2002] 1 MLJ 65 (refd)
Lever Brothers Ltd v Bell [1931] 1 KB 557 (refd)
Loo Hon Kong v Loo Kim Lim @ Loo Kim Leong [2004] 4 AMR 591 (refd)
Palaniappa Chettiar v Arunasalam Chettiar [1962] MLJ 143 (refd)
Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (f) [1984] 1 MLJ 160 (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (refd)
Tinker v Tinker [1970] 2 WLR 331 (refd)
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 (refd)

Legislation referred to

National Land Code s 327

Appeal from: Originating Summons No 24–2215 of 2004 (High Court, Kuala Lumpur)

Ong Chin Siong (Siong & Rita) for the appellant.
Toh Chia Hua (Azman Davidson & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This appeal is directed against the order of the High Court dismissing the plaintiff's (the appellant before us) originating summons dated 8 October 2004. In that summons, the plaintiff claimed, inter alia, a declaration that the defendant (the respondent before us) holds a one half share in a certain property in trust for him. The property in question is a shop lot in Taman Tun Dr Ismail, Kuala Lumpur.

[3] The plaintiff and the defendant are husband and wife. The subject property is registered in the defendant wife's name; that is to say, she is the registered proprietor of it. The plaintiff's case in the court below and before us is that he paid for the subject property and that the defendant paid nothing for it. It is also his case; and this is the basis for the declaration which he sought from the High Court; that there was a common intention between him and the defendant wife that she should hold a half share in the subject property in trust for him. The defendant's case in the court below

and before us is that she paid for the subject property; that the husband lacked the financial ability to have provided any part of the purchase price; that accordingly she is both the owner at law and in equity of the subject property.

[4] Mr Ong Chin Siong, arguing the appeal for the plaintiff husband, has taken us through the relevant documentary evidence in the appeal record to demonstrate that it was his client who provided a large portion of the purchase price. We are in agreement with Mr Ong that the documentary evidence does not support the defendant wife. If that were the only ground on which this appeal stood, then we would perforce to have found for the plaintiff. This is because the defendant's evidence challenging the plaintiff's assertion of payment would not have been a credible denial of that assertion (see *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (f)* [1984] 1 MLJ 160). In the latter case, Lee Hun Hoe CJ (Borneo) said this:

> Not all disputes of fact necessarily raise serious questions to be tried. It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet Judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible. As Lord Diplock said in *Eng Mee Yong*'s case at p 217:
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> > ... In making such order on the application as he 'may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under section 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong...

[5] But that is not the only point in this case. There is another. It is this. The parties being husband and wife, the purchase and registration of the subject property by the plaintiff husband in the defendant wife's name made the wife the beneficial owner of the subject property by reason of the presumption of advancement operating in her favour. To hearken to first principles, where A either purchases property in the name of B or voluntarily (that is to say without any consideration) conveys property to B, then there is a resulting trust in favour of A unless B is A's wife or child or someone to whom A stands *in loco parentis* (see *Westdeutsche Landesbank Girozentrale vIslington London Borough Council* [1996] AC 669). Very little evidence is required to rebut a resulting trust. This is because equity gives effect to the common intention of the parties by implying a resulting trust in favour of A in the example given. Any evidence, provided it is admissible to show a contrary intention, may suffice to rebut the presumption of resulting trust. The same holds true of the presumption of advancement. There is, however, a very important qualification. The presumption of advancement may not be rebutted by evidence of an improper purpose (see *Palaniappa Chettiar vArunasalam Chettiar* [1962] MLJ 143).

[6] What is the evidence here? The wife says that the real intention of the husband, evidentially speaking, is to be found in para 15 of his affidavit dated 25 February 2005. It is at p 101 of the appeal record. And this is what it says:

> I reiterate that due to the nature of my business as a sole proprietor of an engineering firm, my liability is unlimited and in the event of a legal suit against my business, I could possibly go bankrupt if the outcome is not to my favour. Under the circumstances, it has always been my intention to let the defendant hold half share of the Property in trust for me so that in the unfortunate event of my business failing, the future of my entire family including that of the defendant would be secured from the rental generated from the property.

[7] Mr Toh Chia Hua responding to the appeal says that the foregoing paragraph would make it impossible for the presumption of advancement in his client's favour to be rebutted by the husband. Mr Toh relies on the decision of the English Court of Appeal in *Tinker v Tinker* [1970] 2 WLR 331. In that case, the parties, husband and wife, originally had a home in Cheshire. The husband was the sole owner of the property. In 1967, the family upped and moved to Bodmin in Cornwall. The husband got himself a garage business there. He bought a house but put it in his wife's name. A short while later, the marriage ended. A dispute arose as to whom the house belonged. The husband led evidence to show that he had acted on his solicitors' advice to put the house in his wife's name so that his creditors would not be able to reach it in the event that his garage business failed. The court held that the property belonged absolutely to his wife. Lord Denning said this (at p 334):

> But whether the solicitor gave that advice or not, I am quite clear that the husband cannot have it both ways. So he is on the horns of a dilemma. He cannot say that the house is his own and, at one and the same time, say that it is his wife's. As against his wife, he wants to say that it belongs to him. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely: or it was conveyed to her as trustee for her husband. It must be one or the other. The presumption is that it was conveyed to her for her own use: and he does not rebut that presumption by saying that he only did it to defeat his creditors. I think it belongs to her.

[8] Learned counsel for the plaintiff husband seeks to meet the wife's case in two ways. First, he submits that the defendant wife is not entitled to rely on the presumption of advancement because it formed no part of her pleaded case. It only arose in the course of the written arguments that were put before the learned judge. The short answer to this submission is that the presumption of advancement as a matter of law arose because of the relationship of the parties in this case. It does not have to be specifically pleaded or raised in an affidavit. Provided that the relevant facts are placed on record either by way of a pleading or an affidavit, the point may be raised by way of argument. See *Lever Brothers Ltd vBell* [1931] 1 KB 557, in particular the judgment of Scrutton LJ. See also *Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65.

[9] The second point which learned counsel makes is this. He says that the facts of the present appeal more closely resemble those of *Loo Hon Kong v Loo Kim Lim @ Loo Kim Leong* [2004] 4 AMR 591. In that case, an elder brother paid for property which he had caused to be registered in the name of his impecunious younger brother. The relationship was not one to which the presumption of advancement applied. Accordingly, the younger brother held the property on resulting trust for the elder. But the younger brother led evidence to show that the purpose for registering the property in his name had to do with the payment of income tax by the elder

brother. He sought to rely on the decision of the Privy Council in *Palaniappa Chettiar v Arunasalam Chettiar*. This court held for the elder brother on the ground that he was seeking to recover property that was his without having to rely on the evidence of any improper purpose to support his claim. We must accordingly reject learned counsel's argument on this point. In our judgment the facts of *Loo Hon Kong v Loo Kim Lim @ Loo Kim Leong* bear no resemblance whatsoever to the facts of the instant case.

[10] The case then comes to this. The plaintiff husband must in order to establish his case against the defendant rely on the true purpose for registering the subject property in his wife's name. That purpose was to show to the world at large, including his potential creditors that the subject property was not his. But between him and his wife, he would tell her that half of it belonged to him. If the husband in *Tinker v Tinker* could not do it, we cannot see how the plaintiff before us can.

[11] For the reasons already given we have no alternative but to agree with the decision of the High Court and dismiss the summons. We would uphold that order and all other orders made by the judge in this case. The appeal is accordingly dismissed. The appellant will pay costs of this appeal. The deposit in court shall be paid out to the respondent to account for her taxed costs.

Appeal dismissed.

Reported by Sally Kee